

## A Model Agreement for Commissioned Art Work

**H**aving a written commission agreement is essential for artists. No better reason for using one can be posited than to protect your work from a fate similar to Isamu Noguchi's 1,600 pound aluminum sculpture, "Shinto." With greater ease than it takes a banker to cut a customer's credit line, the pinstriped financiers at the Bank of Tokyo's New York City branch slashed Shinto to pieces. The sculpture, especially commissioned by the Bank to hang in its lobby, may have been destroyed completely.

In the absence of a commission agreement stipulating that the Bank cannot, without the artist's consent, modify, alter, destroy or in any way change Shinto, Noguchi had no right to prevent his work's desecration. For unlike California which recently passed an artist's moral rights law (see "California Art Preservation Act," *Artworkers News*, March, 1980) that provides legal protection to artists in this situation, New York has no such law for privately owned art work. Neither are the moral rights sufficiently judicially recognized in this state to protect artists in a case like this.

However, had Noguchi used a commission agreement like the model one printed below, paragraph 10's anti-mutilation and destruction paragraph likely would have caused the Bank to give second thought before mutilating Shinto. If they had proceeded in disregard of the provision, such a violation of the contract would constitute a breach and enable Noguchi to bring a lawsuit for damages among other things.

Not all problems that may arise during the course of the execution of a commission are as dramatic as moral rights, and the artist's need to control and protect the work once it leaves his or her possession. Written commission agreements help avoid other misunderstandings. Memories fade quickly when verbal promises have to be enforced. A written contract can minimize disputes concerning what each party intended for the commission by serving as ready reference for clarification. Potential problems can be anticipated and resolved beforehand. For example, since most commissions are based on the artist's skill and previous work, how free is the artist to deviate from the style of the work shown in the portfolio? Or which party has the right to determine when the work is finished? When are progress payments to be made? May the commissioning party inspect the work in progress? And, under what circumstances may the agreement be terminated?

These questions are considered in the various provisions of the commission contract printed below. The contract is intended to be a model for others. Since it is an "artist's contract" it seeks to give the artist the most protection that reasonably can be expected. Provisions of the agreement should be modified with the help of an attorney to more accurately reflect the needs of the commissioning party and the artist for a specific commission. Lastly, it is suggested that my earlier article, "Negotiating Commission Agreements" be read along with the model agreement which follows.

## Model Agreement for Commissioned Art Work

AGREEMENT made this \_\_\_\_ day of \_\_\_\_, 19\_\_\_\_, between \_\_\_\_  
residing at \_\_\_\_ (the "Artist") and \_\_\_\_  
residing at \_\_\_\_ (the "Commissioning Party.")

WHEREAS the Artist is a recognized professional artist; and

WHEREAS the Commissioning Party desires the Artist to create a work of art (the "Work") in the Artist's unique style,

NOW, THEREFORE, in consideration of the mutual promises and undertakings contained herein, the parties agree as follows:

1. *Preliminary Design.* The artist agrees to create a preliminary design for the Work in the form of studies, sketches, maquettes, or the like, for which the Commissioning Party agrees to pay a fee of \$ \_\_\_\_ upon the signing of this Agreement, according to the following description:

Title of Work:

Approximate size of completed Work:

Materials and Construction method used:

Price of Work:

Within \_\_\_\_ days after the signing of this Agreement, Artist shall deliver the preliminary design. The Commissioning Party shall have two (2) weeks within which to accept the design or request specific modifications in writing. If specific modifications are required, the Commissioning Party agrees to pay Artist \$ \_\_\_\_ per hour as a redesign fee, however, Artist shall not be required to work in excess of (no. of hours). Failure to inform Artist of approval or rejection of the preliminary design within three (3) weeks, shall be deemed to be an acceptance of the last submitted preliminary design.

2. *Purchase Price and Schedule of Payments.* Upon approval of the preliminary design, Artist shall proceed with the execution of the Work and the Commissioning Party agrees to pay the above stated purchase price of \$ \_\_\_\_ as follows:

One third upon approval of the preliminary design;

One third upon Artist's giving written notification that one-half of the Work is completed.

The balance upon Artist's giving written notification that Work is completed. The Commissioning Party agrees to pay all applicable taxes on the Work with the final payment.

The following expenses incurred by the Artist in the course of creating, executing, and installing the Work including but not limited to travel expenses, shall be reimbursed by the Commissioning Party upon the receipt of proper documentation. The Commissioning Party agrees to pay all amounts due within two (2) weeks. If the Commissioning Party fails to make any payment when due, Artist reserves the

right to charge interest at the prime interest rate on amounts past due, prevailing on the due date.

**3. Commissioning Party's right to inspect Work in Progress.** The Commissioning Party may at reasonable times review the Work in progress. Such visits shall be preceded by a telephone communication to the Artist and confirmed in writing.

**4. Completion of Work.** Completion of the Work to be determined by the Artist who shall use his/her professional judgment. It is mutually understood and agreed that it may not be possible to create the Work exactly as depicted in the preliminary design, and that the Artist is obligated to use his/her best professional judgement to create the Work according to the style and the intent of the preliminary design.

**5. Date of Delivery.** The Artist agrees to complete the Work within \_\_\_\_\_ [no. of] days from the date of the Commissioning Party's approval of the preliminary design. This completion date shall be extended for such period of time as the Artist may be disabled by illness preventing progress of the Work. The completion date shall be extended in the event of delays caused by events beyond the Artist's control, including but not limited to fire, theft, strikes, shortages of materials, and acts of God. Time shall not be considered of the essence with respect to the completion of the Work.

**6. Insurance, Shipping and Installation.** Artist agrees to keep the Work fully insured against fire and theft until delivery to the Commissioning Party. In the event of a loss caused by fire or theft, Artist agrees to apply the insurance proceeds toward the completion of the Work. Upon completion, the Work shall be shipped F.O.B. Artist's studio at the expense of the \_\_\_\_\_ [specify] to the following address specified by the Commissioning Party, \_\_\_\_\_ [address]. The Artist shall be given the right to install or supervise the installation of the Work, unless otherwise noted here: \_\_\_\_\_ [explain].

**7. Termination.** This Agreement may be terminated under the following circumstances:

- (A) The Commissioning Party does not approve the preliminary design pursuant to paragraph 1; in such event, Artist shall keep all payments made pursuant to said paragraph.
- (B) Upon the death of the Artist this Agreement terminates automatically, however, the Artist's estate shall retain all payments made and owed to the Artist pursuant to paragraphs 1 & 2.
- (C) The Artist shall have the right to terminate this Agreement, if pursuant to paragraph 2, the Commissioning Party is more than sixty (60) days late in making any payment. However, nothing herein shall prevent the Artist from bringing suit based on the Commissioning Party's breach of contract.
- (D) The Commissioning Party shall have the right to terminate this Agreement if: (i) the illness of the Artist causes a delay of more than six (6) months in the completion of the Work or if events beyond the Artist's control cause a delay of more than one (1) year in the completion date, provided, however, that the Artist shall return all payments made pursuant to paragraphs 1 and 2 and

shall not be liable for any additional expenses, damages or claims of any kind based on the failure to complete the Work; or (ii) the Artist fails without cause to complete the Work within ninety (90) days of the completion date set forth in paragraph 5. In the event of termination pursuant to this subparagraph (D) (ii), the Artist shall return all payments made pursuant to paragraph 2, and shall not be liable for any additional expenses, damages or claims of any kind based on the failure to complete the Work.

The exercise of a right of termination under this paragraph shall be in writing and shall set forth the specific grounds for termination.

#### **8. Ownership.**

- (A) Title to the Work shall remain in the Artist until the Artist is paid in full.
- (B) In the event of termination of this Agreement pursuant to subparagraphs (A), (C), (D) (i) and (D) (ii) of paragraph 7, the Artist shall retain all rights of ownership in the Work and shall have the sole right to complete, exhibit, and sell the Work and any preliminary designs for it. Notwithstanding anything to the contrary herein, the Artist shall retain all right of ownership and shall have returned to him the preliminary design, all incidental works made in the creation of the Work, and all copies and reproductions thereof and of the Work itself.
- (C) In the event of termination pursuant to subparagraph (B) of paragraph 7, the Commissioning Party shall have the right to keep copies of the preliminary design and the Work in progress, for the sole purpose of completing the Work, provided, however, that the Work be completed only by the following person(s) whom the Artist herein designates to complete the Work: \_\_\_\_\_ [specify]. If the Commissioning Party chooses not to have the Work completed by the designated artist, then all copies of preliminary designs, incidental works and the Work in progress immediately shall become the property of the Artist's estate and be returned to the Artist's estate.

**9. Reproduction.** The Artist reserves all rights whatsoever in the Work to copy or reproduce the Work. The Commissioning Party shall be entitled to permit the reproduction of the Work in books, art magazines, and exhibition catalogues, provided that as a condition of any such use, the Artist's copyright notice appear.

**10. Non-Destruction, Alteration and Maintenance.** The Commissioning Party agrees not to intentionally destroy, damage, alter, modify or otherwise change the Work in any way whatsoever. If any alteration of any kind occurs after the receipt by the Commissioning Party, whether intentional or accidental and whether done by the Commissioning Party or others, then the Artist has the right to request that the Work shall no longer be represented to be the Work of the Artist. The Commissioning Party shall be responsible for the proper cleaning, maintenance and protection of the Work in its possession, or if on loan or otherwise exhibited.

**11. Repairs.** All repairs and restorations which are made during the Artist's lifetime to the Work shall have the Artist's written approval. To the extent practicable, the Artist shall be given the opportunity to accomplish such repairs and restorations for a reasonable fee. Should the Artist refuse to approve the repair

and/or restoration, the Commissioning Party may proceed with said repair and restoration and, at the Artist's request in writing, remove his/her name from any identifying plaque.

**12. Artist's Exhibition.** Artist shall have the right to borrow the Work for a single period up to sixty (60) days once every 2 years for exhibition to the public at no expense to the Commissioning Party upon prior written notice and upon proof of sufficient insurance and pre-paid transportation costs.

**13. Removal of Work.** The Commissioning Party may remove the Work from the address specified in paragraph 6, for purposes of exhibition upon giving written notice of the location to the Artist (60) days prior to removal of the Work.

**14. Travel.** Travel expenses incurred by the Artist as may be necessary and proper for the performance of this Agreement shall be paid by the \_\_\_\_\_ [indicate] as follows: [specify]

**15. Resale Royalty.** If the Commissioning Party sells the Work, exchanges or barter it for another work of art, or donates it to a museum or other charitable institution and in so doing you receive a charitable deduction from your taxes, you agree to pay me 15 percent of either the excess of respectively: the gross amount realized from the sale of the Work over the purchase price; the fair market value of the work of art received in exchange or in trade over the purchase price; or the tax deduction so taken over the purchase price.

**16. Integration.** This Agreement constitutes the entire understanding between the parties and may not be changed or modified except in writing signed by both parties.

**17. Non-Assignability.** Neither party hereto shall have the right to assign this Agreement without the prior written consent of the other party. Artist shall, however, retain the right to assign monies due him/her pursuant to the terms of this Agreement.

**18. Heirs and Assigns.** This Agreement shall be binding upon the parties hereto, their heirs, assigns and personal representatives.

**19. Waivers.** A waiver of any breach of any of the provisions of this Agreement shall not be construed to be a continuing waiver of other breaches of the same of other provisions hereof.

**20. Notices.** Any notice required to be given hereunder shall be deemed sufficiently given if sent by certified mail to the above mentioned address or to such other address or addresses as either party may hereafter designate by notice given in the same manner.

**21. Governing Law.** The Agreement shall be governed by the laws of \_\_\_\_\_ [jurisdiction].

Commissioning Party \_\_\_\_\_

Artist \_\_\_\_\_

## Loan Agreements: A Model Artist-Museum Loan Agreement

**L**oaning works of art to museums for exhibition shouldn't, but frequently does, pose problems for artists. The particularly fragile nature of most art work makes it susceptible to damage by careless acts of museum employees and the viewing public, and to acts of vandalism and theft.

Absent a contract the common law rules of bailment govern artist-museum loans. Generally speaking, the rules provide that a museum is liable for any damage or loss to a work of art loaned by the artist if the museum exercised a standard of care with respect to that work which was less than the level of care it would ordinarily exercise with respect to the safekeeping of its own property. The laws of bailment, however, do not impose absolute liability on the borrowing museum—so that under some circumstances a work can be returned in a damaged condition at the conclusion of the loan and the museum might not be legally responsible.

Since the rules of bailment do not fully protect the lender, it is recommended that the artist supplement the laws of bailment with a loan agreement like the Model Agreement printed below. This agreement fills in the gaps of protection which the law of bailment leaves open.

The Model Agreement provided here is designed for single-item loans. Loans of a collection should be the subject of a more

extensive agreement. In addition to providing such loan essentials as insurance, standard of care, shipping details, and an option for sale, the model agreement embodies such ancillary items as reproduction rights, restoration and repair, and the manner in which the work should be displayed when exhibited.

The Model Agreement maximizes the artist/lender's protection and functions as an invaluable piece of evidence should the loaned work be damaged during the course of the loan (including damage during transport to and from the museum) and the artist have to litigate to satisfy damage claims.

Lastly, although there is no "Standard Museum Loan Agreement," a number of museums use some form which you might be asked to sign. You, of course, can offer your own. But if this is not possible, be sure to compare the offered agreement with the Model Agreement before you sign.

Certain points should be examined carefully. For example, some museum agreements try to limit responsibility for any damage caused to a work while in transit or in a museum on loan. Identify these limits. It is advised, too, to look at the insurance provision carefully so you know the extent of insurance coverage and what perils are excluded.

Turn page for Model Agreement.